IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

MONDAY, THE 4TH JUNE 2007 / 14TH JYAISHTA 1929

SA.No. 571 of 1993()

AGAINST THE JUDGMENT AND DECREE IN AS.75/1990 of DISTRICT COURT, PALAKKAD.
OS.225/1985 of MUNSIFF COURT, CHITTUR
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APPELLANT/ APPELLANTS 1 & 2 / DEFENDANT 1 & 2
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1. **BHEEVATHUMMA, D/O. KADAR MOIDEEN RAWTHAR, MANDANKIZHAYA, MUTHALAMADA AMSOM, CHITTUR TALUK, PALAKKAD DISTRICT (DIED)**

2. **N.V.KAMARUDDIN, S/O. VHEEVATHUMMA, NANDAKIZHAYA, MUTHALAMADA AMSOM, CHITTUR TALUK, PALAKKAD DISTRICT.**

***ADDL. APPELLANTS 3 AND 4.**

3. **BADARNEESA, W/O. SYDAPPA RAWTHER, KABETHECHALLA MUTHALAMAD P.O. CHITTUR TALUK, PALAKKAD DISTRICT – 678 507.**

4. **SHAREEFA, W/O. KATTUVA SAHIB, PATTANITHERUVU, THATHAMANGALAM P.O. CHITTOOR PALAKKAD DISTRICT.**

ADDL. APPELLANTS 3 AND 4 ARE IMPLEADED AS THE LRS OF THE DECEASED 1ST APPELLANT VIDE ORDER DT. 3.11.06 IN IA. 2301.

*** DEATH OF THE 1ST APPELLANT IS RECORDED VIDE ORDER DT.3.11.06 IN MEMO DT.5.10.06 AND ADDL.APPELLANT 3 AND 4 ARE IMPLEADED AS THE LRS OF THE DECEASED 1ST APPELLANT VIDE ORDER DT.3.11.06. IN IA. 2301/06.**

BY ADV. SRI P VELAYUDHAN
SRI.T.M.CHANDRAN

SA NO.571/1993

RESPONDENTS/ RESPONDENT 3RD – APPELLANT/ PLAINTIFF- DEFENDANT NO.3
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1. **MUHAMMAD KHANI RAWTHAR, S/O. KADAR MOIDEEN RAWTHAR, NANDANKIZHAYA, MUTHALAMADA AMSOM, CHITTUR TALUK, PALAKKAD DISTRICT.**

2. **SHAMSUDDIN, S/O. BHEEVATHUMMA, NANDANKIZHAYA, MUTHALAMADA AMSOM, CHITTUR TALUK, PALAKKAD DISTRICT.**

(SINCE THE 2ND RESPONDENT IS NOT AVAILABLE TO AFFIX HIS SIGNATURE IN THE VAKKALATH HE IS MADE 2ND RESPONDENT IN THIS APPEAL.

BY ADV. SRI V CHITAMBARESH - R1
SRI.T.C.SURESH MENON
SRI N SUBRAMANIAM - R2

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 04/ 06 / 2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.
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S.A. No. 571 OF 1993

Dated this the 4th day of June, 2007
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J U D G M E N T

Defendants 1 and 2 in O.S.225/1985 on the file of Munsiff Court, Chittur are the appellants. First respondent is the plaintiff and second respondent the 3rd defendant. First respondent instituted the suit seeking a decree for permanent prohibitory injunction restraining defendants from tress passing into the plaint schedule properties consisting five items of properties. There was no dispute with regard to the right and possession of first respondent obtained under Ext. A1 gift deed over items 1 to 4. Defendants in their written statement admitted that first respondent is in possession of items no. 1 to 4 of the plaint schedule properties and they do not claim any right or possession over the same. The dispute is with regard to item no.5 of the plaint schedule properties which is 16 cents in survey no. 538 A of Muthalamada village. Admittedly, the said property originally belonged to the mother of first defendant, who was the first wife of Khader Moideen Rawther, father of first respondent. First appellant along with her sister and brothers are the children of Beevathumma, the second wife wife of Khader Moideen Rawther. First respondent is the daughter of Khader Moideen Rawther in his first wife. Second appellant and 2nd

respondent are the children of the first appellant. Under Ext. B1 release deed first respondent, her sister and brother released their right over the the properties in favour of first appellant. According to the first respondent, there after as per an oral gift and also as Ext. A2 gift deed executed by the first appellant, item no. 5 of the plaint schedule properties was put in possession of first respondent and her sisters and thus she has been in possession of the properties and defendants have no manner of right or possession over the same. Contending that they are attempting to tress pass into the properties, a decree for injunction restraining them from tress pass was sought. Defendants in their written statement disputed the oral gift and Ext.A2 gift deed. According to defendants there was no gift either oral or documentary. It was contended that after Ext. B1 first respondent and her sister did not have any house to reside and as sought for by them, permission was granted to reside in the two houses situated in the property and they are thus in possession of 7 cents of item no. 5 of the plaint schedule properties and Ext.A2 is vitiated by undue influence, fraud and misrepresentation and they are taking separate steps to get Ext.A2 gift deed set aside. Contending that first respondent is not in possession of the property more than the 7 cents, it was contended that he is not entitled to the decree for injunction.

2. Learned Munsiff framed necessary issues. On the evidence of Pw1 and 2, DW1 and 2, Exts. A1 and 2 and B1 to 7, learned Munsiff upheld the case of oral gift as well as Ext. A2 gift and finding that first respondent established possession of the entire plaint schedule properties granted a decree for permanent prohibitory injunction in respect of all the five items of properties as sought for. The decree was challenged before District Court, Palakkad by all the defendants in A.S.75/1990. Learned District Judge on re-appreciation of evidence held that there is no acceptable evidence to prove the oral gift. But the learned District Judge found that Ext.A2 gift deed is valid and is not vitiated as claimed by the defendants. It was also found that even though the oral gift in respect of the remaining 9 cents in item No. 5 of the plaint schedule properties was not established, evidence conclusively prove that first respondent has been in possession of the entire item No. 5 of the plaint schedule properties. Holding that defendants did not dispute the right and possession of the first respondent in respect of the item No. 1 to 4 of the plaint schedule properties, decree granted in respect of those properties was set aside as there was no necessity to grant a decree in respect of those properties. The decree for injunction granted in respect of the item no.5 of the plaint schedule property was confirmed.

3. The second appeal is filed challenging the said modified decree of the learned District Judge, by defendants 1 and 2.

4. Learned counsel appearing for appellants and first respondent and as well as learned counsel appearing for second respondent were heard.

5. The appeal was admitted formulating the following substantial questions of law.

i) Whether the 3 conditions to prove the essentials of a valid gift under Muhammadean Law. (a) a declaration (b) acceptance on the part of a donee (c) delivery of possession are proved in this case so as to make the gift valid?

ii) Whether the doctrine of 'Mushaa' has application to the facts of this case, since the alleged gift are in favour of several donees jointly by donors jointly, in respect of a property capable of division?

iii) Whether the donor had given delivery of possession by some overtact by the donor to enable the donee to obtain possession so as to complete a valid gift?

6. Even though substantial questions of law were formulated while admitting the appeal, as provided under Sub Section 5 of Section 100 of Code of Civil Procedure, first respondent is entitled to argue that no substantial questions of law arises in the appeal. Therefore the

fact that substantial questions of law were formulated will not disable first respondent to argue that no substantial questions of law as formulated is involved in the appeal.

7. Though the trial court up held the oral gift, first appellate court held that the oral gift was not established. No cross objection was filed by first respondent against that finding. In such circumstances the validity of the oral gift set up by the first respondent, which was upheld by the trial court but set aside by the first appellate court, does not arise for consideration in the second appeal. Therefore substantial questions of law as formulated in the appeal do not arise for consideration.

8. Learned District Judge upheld the decree for injunction with regard to item No. 5 of the plaint schedule properties on the basis of the findings on the question of possession. The question is whether in a second appeal interference is warranted on such findings. Learned counsel appearing for first respondent relied on the decision of Apex Court in *Mohanlal vs. Nihal Singh* (2001 (8) SCC 584) and argued that the concurrent findings on question of possession is essentially one of fact and is not a substantial question of law. Their Lord ships of the Apex Court in Mohanlal's case considered that question in para 11. Finding that the trial court on appreciation of the oral and documentary

evidence on record declined to accept the case of the defendant that the lease deed executed by him in favour of the plaintiff was a mere paper transaction and that he (defendant) had remained in possession of the property all along and the trial court recorded a positive finding based on the revenue records and the oral evidence lead by the plaintiff that he had come in to possession of the land under the lease deed and continued to possess the same all along and the lower appellate court, which is the final court of fact, confirmed the finding of the trial court regarding the plaintiff's possession over the suit land and upheld the judgment of the trial court decreeing the suit, it was held that question of possession is not a substantial question of law. Their lordships held "there was hardly any scope for the High Court to interfere with the finding of possession concurrently recorded by the courts below within the limit of parameters of Section 100 of the Civil Procedure Code. As the second appeal did not involve any substantial question of law the High Court rightly dismissed the same".

9. Even though first respondent claimed possession of item No. 5 of the plaint schedule properties on the basis of A2 gift deed and an oral gift and the oral gift was not upheld by the first appellate court, on the evidence a finding of fact was entered into by both the courts, that first respondents has been in possession of the entire item

No.5 of plaint schedule properties. Even in the written statement, defendants admitted that first respondent has been in possession of 7 cents of land in item no.5 of the plaint schedule properties. True, it was contended that it is not as per the gift deed or oral gift but as per an oral permission granted. It was also admitted in the written statement that first respondent is in possession of two buildings therein, though it was contended that the buildings are in the 7 cents of property. Evidence establish that only one house is situated in the plot which is covered under Ext.A2 gift deed. As far as Ext. A2 gift deed is concerned the contention taken in the written statement was that it was vitiated by undue influence, fraud and misrepresentation. It was also contended that defendants are taking steps to institute a suit to get the sale deed set aside. Those grounds were not established. Learned counsel for the appellants have no case that defendants have filed any such suit till this day. In such circumstances it is not open to them at this stage to challenge Ext.A2. The property covered under Ext.A2 consists of one building. Evidence of first defendant as DW1 is to effect that building on the northern plot was constructed by the appellants. It is against the contention raised in the written statement. Courts below re-appreciating the evidence found that the entire item No.5 of plaint schedule properties is in the

possession of first respondent. It is a factual finding. No substantial question of law is involved in the appeal.

In the result, the Second Appeal is dismissed.

M.SASIDHARAN NAMBIAR
JUDGE.

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